

2

No. 87-1129

Supreme Court, U.S.

FILED

FEB 3 1988

JOSEPH E. SPANIOLO, JR.
CLERK

In The
Supreme Court of the United States

October Term, 1987

— o —
ALASKA TRAMS CORPORATION,
a/k/a ALASKA TRAMS, INC.,

Petitioner,

vs.

ALASKA ELECTRIC LIGHT & POWER COMPANY,
an Alaska Corporation; WILLIAM A. CORBUS; DOES
I-XX; and an aerial right-of-way, an easement 1300
linear feet in length, more or less,

Respondents.

— o —
**ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF ALASKA**

— o —
RESPONDENTS' BRIEF IN OPPOSITION

— o —
JOHN F. CLOUGH, III
FAULKNER, BANFIELD, DOOGAN
& HOLMES
302 Gold Street
Juneau, Alaska 99801
(907) 586-2210

Counsel for Respondents



QUESTIONS PRESENTED FOR REVIEW

I. Does this Court have jurisdiction over issues that were never raised, argued or decided in the lower courts?

II. Does the dismissal of petitioner's case for willful refusal to comply with the trial court's numerous discovery orders constitute a denial of due process?

III. Does this Court have jurisdiction over matters of exclusively state law?

PARTIES TO THE PROCEEDING

The parties to the proceeding are:

1. Alaska Trams Corporation
2. Alaska Electric Light and Power Company
3. William A. Corbus
4. Does I-XX
5. An aerial right-of-way, an easement 1300 linear feet in length, more or less.

So far as is known to respondents, Alaska Trams Corporation has no parent corporations, subsidiaries, or affiliates.

Alaska Electric Light and Power Company has the following subsidiaries:

1. Alaska Electric Light and Power Company of Juneau
2. Haines Light and Power Company
3. Alaska Land and Pier Company
4. AJT Mining Properties, Inc.

TABLE OF CONTENTS

	Page(s)
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
STATEMENT OF JURISDICTION	1
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	3
I. THIS COURT DOES NOT HAVE JURISDICTION OVER ISSUES THAT WERE NEVER RAISED OR ARGUED IN THE COURTS BELOW	3
II. PETITIONER WAS AFFORDED DUE PROCESS OF LAW BY THE COURTS OF THE STATE OF ALASKA	5
III. CONCLUSION	9
IV. APPENDIX	
Alaska Trams Corporation, a/k/a Alaska Trams, Inc. v. Alaska Electric Light & Power, et al., No. 3229 slip op. (Alaska Supreme Court, Oct. 2, 1987)	App. 1
Alaska Trams Corporation, a/k/a Alaska Trams, Inc. v. Alaska Electric Light & Power, et al., No. 1JU-84-1469 (Alaska Superior Court, Nov. 6, 1985) (Memorandum Decision and Order) App. 14	

TABLE OF AUTHORITIES

	Page(s)
CASES	
Beck v. Washington, 369 U.S. 541 (1962)	5
Cardinale v. Louisiana, 394 U.S. 437 (1969)	3, 4
Crowell v. Randell, 35 U.S. (10 Pet.) 368 (1836)	3
Dade v. State, 725 P.2d 706 (Alaska 1986)	4
Hammond Packing Co. v. Arkansas, 212 U.S. 322 (1909)	8
Hawes Firearms Co. v. Edwards, 634 P.2d 377 (Alaska 1981)	9
National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976)	4, 7
Oceanview Homeowner's Ass'n. v. Quadrant Con- struction and Engineering, 680 P.2d 793 (Alaska 1984)	5
Stone v. Powell, 428 U.S. 465 (1976)	9
Wyle v. R.J. Reynolds Industries, Inc., 709 F.2d 585 (9th Cir. 1983)	7
STATUTES	
28 U.S.C. § 1257(3)	1, 3, 5

STATEMENT OF JURISDICTION

This Court has no jurisdiction over the issues sought to be raised by the petitioner. As discussed *infra*, in the argument on Reasons for Denying the Writ, no federal question was argued or decided in the state court below. Both the statute governing the jurisdiction of this Court on writ of certiorari and this Court's own rules prevent petitioner's case from being heard. See 28 U.S.C. § 1257(3); Supreme Court Rules 17.1(b) and (c) and 21.2(h).



STATEMENT OF THE CASE

For a number of years, petitioner Alaska Trams Corporation, a/k/a Alaska Trams, Inc., has talked about constructing a hotel/resort and tramway project utilizing the top of Mt. Juneau in Juneau, Alaska. In furtherance of these plans, Alaska Trams representatives approached respondent Alaska Electric Light and Power Company (hereinafter "AELP") concerning the purchase of AELP property near downtown Juneau to serve as a hotel site and lower terminus for the tramway. Alaska Trams also desired to obtain an extensive aerial easement across other property belonging to AELP, to permit the passage of the proposed tram.

During 1975 and 1976, representatives of Alaska Trams and AELP conducted extensive negotiations concerning these properties (R. 196-199). Although the parties were able to agree on the terms for the sale of the parcel, they were unable to reach agreement upon the terms

of the separate aerial easement (R. 197-199). Notwithstanding this lack of agreement, Alaska Trams went ahead with the purchase of the parcel (R. 23-29, 197-99, 335-37).

In November 1976, the parties entered into a contract of sale whereby Alaska Trams agreed to purchase a two and one-half acre parcel of real property from AELP (R. 23-29). The contract contained a specific description of the property AELP agreed to sell, which included neither a description nor a reference to any aerial easements. AELP delivered a warranty deed to the real property to a closing agent in December of 1976 (R. 23, 28). At no time did the parties ever enter into any transaction which purported to convey the aerial easement.

Over the course of the next eight years, Alaska Trams made a number of demands that AELP convey an aerial easement to the company for no additional consideration. AELP declined to accede to Alaska Tram's demands. Finally, Alaska Trams filed suit on August 6, 1984, claiming breach of the 1976 contract, seeking conveyance of the easement and claiming damages in excess of one billion dollars. Each of Alaska Trams' thirteen causes of action was dismissed through the grant of summary judgment motions in AELP's favor. The trial court also dismissed Alaska Trams' suit with prejudice pursuant to Alaska Civil Rule 37(b)(2), as a sanction for Alaska Trams' willful and inexcusable refusal to comply with at least four separate discovery orders.

Alaska Trams appealed to the Alaska Supreme Court, challenging the imposition of dismissal as a discovery sanction, as well as the lower court's unfavorable rulings on several of Alaska Trams' contract, tort, and condemna-

tion claims. Alaska Trams also appealed the trial court judge's and an independent superior court judge's refusal to disqualify the trial court judge, Judge Pegues, for cause. The Alaska Supreme Court upheld the lower court judges' refusal to disqualify the trial judge, and affirmed the court's imposition of dismissal as a discovery sanction. Because the supreme court upheld the sanction of dismissal, it did not consider Alaska Trams' other arguments.

REASONS FOR DENYING THE WRIT

I. THIS COURT DOES NOT HAVE JURISDICTION OVER ISSUES THAT WERE NEVER RAISED OR ARGUED IN THE COURTS BELOW

This Court has jurisdiction to review the decisions of the highest court of a state only under narrow circumstances. See 28 U.S.C. § 1257(3). The jurisdiction extends only to the state court decisions in which substantial federal questions have been properly raised in the state forum. *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969); *Crowell v. Randell*, 35 U.S. (10 Pet.) 368 (1836).

As this Court explained in *Cardinale*, questions that are not raised in state court are "those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind." 394 U.S. at 439. That is exactly the situation here. Alaska Trams admits that the Alaska Supreme Court "did not address constitutional due process." (Pet. for Cert., p. 13). This is not surprising, since the issue was not raised or argued

before that court. In the course of petitioner's 74 page brief to the Alaska Supreme Court, due process is mentioned just once, in the following discussion:

There are several reasons for increased scrutiny in review of a litigation ending sanction imposed pursuant to Rule 37(b). One reason is that an abuse of discretion may involve a constitutional due process violation.

(Appellant's Brief at 61). Only a single citation was offered as support of the statement. No analysis or substantive argument was presented. In its reply brief before the Alaska Supreme Court, Alaska Trams did not mention the federal issue at all.¹ The Alaska Supreme Court provided exactly one sentence dealing with due process. It said:

Although sanctions which end litigation are generally disfavored and may even constitute a denial of due process, the imposition of such sanctions is justified if the failure to comply with a discovery order is willful.

(Appendix at 7). These equivocal references do not constitute an argument or an adjudication.

The United States Supreme Court has no jurisdiction to review the action of a state court unless a federal issue is raised and decided in the lower court. This principle was stated clearly in *Cardinale*: "It was very early es-

¹The argument was never even inferentially raised before the trial court, within whose discretion the sanction power resides. See *Dade v. State*, 725 P.2d 706, 708 (Alaska 1986); accord, *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 642-43 (1976).

tablished that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions." 394 U.S. at 438. Even the petitioner concedes that the federal issue it now seeks to create was not addressed by the state court. There is therefore nothing for this Court to review.

In addition, the issue was not raised in the Statement of Points on Appeal required to be filed by every Alaskan appellant. See Alaska Rule of Appellate Procedure 210(e). The Alaska Supreme Court has held that matters not raised in the Statement of Points on Appeal will not be considered. *Oceanview Homeowner's Ass'n. v. Quadrant Construction and Engineering*, 680 P.2d 793, 797 (Alaska 1984). This Court has made the same point. In *Beck v. Washington*, 369 U.S. 541, 553 (1962), this Court held that the issue sought to be raised by the petitioner had been waived because it had not been raised in the assignment of errors below, had not been argued in the petitioner's brief, and had been mentioned only once in the petitioner's 125 page brief before the lower court.

For the reasons given in *Beck*, and because of the limitations imposed by the grant of jurisdiction in 28 U.S.C. 1257(3), this court should refuse to grant a review of petitioner's alleged federal claim.

II. PETITIONER WAS AFFORDED DUE PROCESS OF LAW BY THE COURTS OF THE STATE OF ALASKA

The Alaska Supreme Court's decision is obviously correct on the merits. Alaska Trams repeatedly refused to produce materials related to its alleged damages, financ-

ing, ownership and tax liability despite four separate orders that it do so. *See* Alaska Supreme Court's detailed history of discovery orders at Appendix 10-12. The trial court's final order required that Alaska Trams comply fully with the court's order to produce by August 27, 1985 or prove to the court its inability to comply. The court warned that failure to heed its order would result in dismissal with prejudice of Alaska Trams' complaint. Alaska Trams nevertheless failed to produce the requested documents or to make any showing that it was unable to comply with the court's order. Appendix 11-12, 19. At this point more than a year had passed since AELP's original request for the materials in question. AELP moved to dismiss Alaska Trams' action on September 5th, 1985. Appendix 12.

Following AELP's motion, Alaska Trams invited counsel for AELP to attend a production session in an unrelated case, at which many, but not all, of the requested materials were finally produced.² The trial court found that this belated discovery did not preclude dismissal of Alaska Trams' complaint. It noted that

Alaska Trams willfully disobeyed orders of this court and ultimate discovery was made only after the final deadlines set in this case and then as a result of events in an unrelated case

Appendix 20. The court acknowledged that litigation-ending sanctions should be employed sparingly, but found that

²Contrary to the implications set forth at page 9 of the Petition, the amount of withheld material was quite voluminous, comprising most of three entire boxes of documents (R. 1427-1442).

they are necessary here to deter just the kind of conduct that Alaska Trams has purposely decided to employ.

Appendix 22. This Court has expressly recognized the appropriateness of litigation-ending sanctions to deter parties who would be inclined to ignore a court's discovery orders in the absence of such a deterrent. *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976).

As the trial court noted, the requested documents were essential to Alaska Trams' claims that it had changed position in reliance on AELP's alleged promises and had incurred damages. They were also important to prove or disprove AELP's claim that Alaska Trams had never secured financing for the project because the project was not economically feasible. Appendix 20-21. These issues went to the heart of Alaska Trams' case. In its opinion, the Alaska Supreme Court explained that the existence of damages is often of primary importance in litigation; information concerning damages is essential in assessing the strength of an opponent's case, and thus in determining fundamental questions of trial strategy, such as one's position toward settlement. Appendix 9-10. *Accord Wyle v. R.J. Reynolds, Industries, Inc.*, 709 F.2d 585, 591 (9th Cir. 1983).

The economic feasibility of the project was relevant to Alaska Trams' intent in entering the land purchase contract with AELP; information Alaska Trams provided to prospective financiers, and the conditions on which any financing was advanced, had bearing on whether Alaska Trams' project constituted a "public use" under Alaska's

eminent domain laws. The same information would have yielded evidence as to whether equitable relief was required to make Alaska Trams whole, and information concerning ownership of the tramway company was relevant to the issues of witness identification and potential bias, among others.

Clearly, the requested information contained material that was fundamental to every aspect of Alaska Trams' claims. Alaska Trams' refusal to produce materials that would corroborate its assertions that the tramway project was economically viable and that hundreds of millions of dollars were at stake in the litigation, together with its failure to offer any reasonable justification for its refusal to do so, suggested strongly that such evidence did not exist or that the requested materials would tend to disprove Alaska Trams' claims. Therefore, the superior court concluded it was

reasonable for this court to infer that Alaska Trams has no case—or at best a very weak case—on the merits.

Appendix 21. Consequently, the discovery sanction imposed was not “mere punishment,” but recognized Alaska Trams' failure to produce documents essential to its case as “an admission of the want of merit” of its asserted claims. *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 351 (1909).

There is no federal question for this Court to decide. The Alaska Superior Court dismissed Alaska Trams' suit because of violations of discovery orders issued pursuant to Rule 37(b)(2)(C) of the Alaska Rules of Civil Procedure. Alaska Trams failed to produce documents after explicit

warnings that dismissal would result if Alaska Trams continued to defy the court's orders. As a result of Alaska Trams' "willful noncompliance" with court orders, and in accordance with the Alaska law set out in *Hawes Firearms Co. v. Edwards*, 634 P.2d 377, 378 (Alaska 1981), the trial court imposed the sanction of dismissal.

The real issue in this suit is purely one of state law. The state courts must be permitted to interpret the state rules of civil discovery in accordance with state law. Where they do so with full appreciation and deference to federal due process standards, their decisions should not be disturbed. *Cf. Stone v. Powell*, 428 U.S. 465, 493 n. 35 (1976). Because the state courts here have interpreted and applied the state rules properly, and have not raised any implicit or explicit due process concerns, no important federal question can be at issue.

III. CONCLUSION

One of the dominant features of this litigation, from its very inception, has been the petitioner's flagrant disregard of both the substantive and procedural legal doctrines which govern Alaska Trams' extravagant claim. Just as Alaska Trams ignored the numerous reasonable discovery orders of the trial court, so has it now ignored the requirements for jurisdiction in this Court. In its petition, Alaska Trams has raised and argued issues which have not previously been the subject of briefing, argument or even serious consideration before the Alaska courts. On that basis alone, this Court should refuse to entertain Alaska Trams' petition.

For Alaska Trams to argue that the Superior Court's sanction constituted a denial of due process is ludicrous. In three carefully crafted opinions totalling 68 pages the trial court considered the merits of each one of Alaska Trams' causes of action. None was sufficient to withstand summary judgment. Alaska Trams' flagrant disregard of the court's orders and willful abuse of the discovery process constituted an independent justification for the dismissal of its case. The Alaska Supreme Court affirmed the lower court's determination that Alaska Trams' behavior fully justified the imposition of a litigation-ending sanction under Alaska law. The courts of Alaska have not denied Alaska Trams due process. Alaska Trams' problems are clearly of its own making, and do not warrant the intercession of the United States Supreme Court.

RESPECTFULLY SUBMITTED this 3rd day of February, 1988.

FAULKNER, BANFIELD, DOOGAN
& HOLMES
JOHN F. CLOUGH, III
302 Gold Street
Juneau, Alaska 99801
(907) 586-2210

Attorneys for Respondents

APPENDIX

NOTICE: This opinion is subject to formal correction before publication in the *Pacific Reporter*. Readers are requested to bring typographical or other formal errors to the attention of the Clerk of the Appellate Courts, 303 K Street, Anchorage, Alaska 99501, in order that corrections may be made prior to permanent publication.

**THE SUPREME COURT OF THE
STATE OF ALASKA**

ALASKA TRAMS)	
CORPORATION, a/k/a-)	
ALASKA TRAMS, INC.,)	File No. S-1360
)	
Appellant,)	
)	OPINION
v.)	
)	
ALASKA ELECTRIC LIGHT &)	[No. 3229 - October
POWER, an Alaska Corporation;)	2, 1987]
WILLIAM A. CORBUS; DOES)	
I-XX; and an AERIAL RIGHT-)	
OF-WAY, an Easement 1300 Linear)	
Feet in Length, More or Less,)	
)	
Appellees.)	

Appeal from the Superior Court of the State of Alaska, First Judicial District, Juneau, Rodger W. Pegues and Henry C. Keene, Jr., Judges.

Appearances: Bruce A. Moore and A. Lee Petersen, Law Offices of A. Lee Petersen, Anchorage, for Appellant. John F. Clough, III, Leon T. Vance, and Ann G. Vance, Faulkner, Banfield, Doogan & Holmes, Juneau, for Appellees.

App. 2

Before: Rabinowitz, Chief Justice, Burke, Matthews, Compton, and Moore, Justices.

BURKE, Justice.

This appeal arises from the dismissal of appellant Alaska Trams' action against appellees Alaska Electric Light & Power, William A. Corbus, and certain real property (hereinafter AELP, collectively) to secure an aerial easement required for the construction of a tramway.¹ Because we are unable to say that the trial court abused its discretion in dismissing the action, the judgment of the superior court is affirmed.

I

For several years, Alaska Trams had wanted to build a tramway between the City of Juneau and the top of Mt. Juneau as part of a resort/hotel complex. In preparation for the anticipated construction, Alaska Trams contacted AELP to purchase certain real property to be used as a base for the tram terminal and hotel. Alaska Trams also wanted to obtain an aerial easement to permit the tramway to cross AELP's adjacent property.

Negotiations were consummated in November 1976 when Alaska Trams and AELP signed a contract for the sale of 2.5 acres near downtown Juneau. The sale was closed in December 1976. The contract did not mention an aerial easement over adjacent AELP property. It is this omission which forms the basis of this appeal.

Roughly nine months later, in August 1977, Alaska Trams sent a letter to AELP in which Alaska Trams indi-

1. William A. Corbus and Does I-XX are employees or agents of AELP.

App. 3

cated that it was aware that the contract did not contain explicit mention of the easement in question. The letter also indicated, however, that it was Alaska Trams' belief that "this was just an oversight in typing." This letter was the opening salvo: between 1977 and 1984, Alaska Trams sent AELP no fewer than twelve letters, all threatening legal action if AELP did not immediately convey the aerial easement. AELP did not convey the easement; Alaska Trams finally filed suit on August 6, 1984 seeking conveyance of the easement or damages.

In January 1985, Alaska Trams filed a motion to disqualify Judge Pegues for cause. Judge Pegues denied the motion. The motion was referred to an independent judge, Judge Keene, for a ruling pursuant to AS 22.20.020(c).² Judge Keene also denied the motion.

Ultimately, all of Alaska Trams' causes of action were dismissed on AELP's various summary judgment motions. In addition, the trial court dismissed Alaska Trams' action with prejudice as a sanction under Civil Rule 37(b)(2)³ for

2. AS 22.20.020(c) provides in part:

If a judicial officer denies disqualification the question shall be heard and determined by another judge assigned for the purpose by the presiding judge of the next higher level of courts or, if none, by the other members of the supreme court.

3. Alaska R. Civ. P. 37(b)(2) provides in part:

If a party or an officer, director, or managing agent of a party . . . fails to obey an order to provide or permit discovery, . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

. . . .

(C) An order . . . dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party

App. 4

what the trial court termed Alaska Trams' unexcused and willful refusal to comply with discovery orders. This appeal followed.

II

The first issue we address concerns Judge Pegues' and Keene's refusal to disqualify Judge Pegues after he was challenged for cause. Alaska Trams argues that both Judge Pegues and Judge Keene based their determinations solely upon AS 22.20.020(a)(6),⁴ rather than upon the recusal considerations discussed in Alaska Code of Judicial Conduct Canon 3(C)(1)(a).⁵ Alaska Trams asserts that, had Canon 3(C) been considered, Judge Pegues would have been disqualified because of the reasonable inference that Judge Pegues was biased against Alaska Trams. This argument is supported by citation to a number of instances of alleged bias, including counsel's generalized feelings of

4. AS 22.20.020(a)(6) provides:

A judicial officer may not act as such in a court of which the judicial officer is a member in an action in which

(6) the judicial officer feels that, for any reason, a fair and impartial decision cannot be given.

Subsections (1)-(5) of AS 22.20.020(a) involve objective measures of cause for disqualification, such as personal involvement in a case, as opposed to the subjective measure relevant here.

5. Alaska Code of Judicial Conduct Canon 3(C)(1) provides:

A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings; . . .

unfair treatment, Judge Pegues' past involvement in environmental protection movements, unspecified sarcastic comments made by Judge Pegues in another proceeding, and a comment contained in a memorandum opinion in which Judge Pegues denied Alaska Trams' motion for preliminary injunction.⁶

In making this argument, Alaska Trams misses an important point: the trial court explicitly considered the recusal standard found in Canon 3(C) and determined that recusal under that standard was inappropriate. Thus, Alaska Trams' argument alleging that the judge failed to consider the ethical canon is without merit.⁷

The remaining question is whether Judges Pegues' and Keene's refusal to disqualify Judge Pegues constituted an abuse of discretion. *Amidon v. State*, 604 P.2d 575, 577 (Alaska 1979). Such a refusal is to be accorded great weight and will be reversed on appeal only when it is evident that reasonable persons could not rationally

6. In the order denying the preliminary injunction, Judge Pegues referred to "Alaska Trams' imminent, alleged irreparable injury." He then noted that:

The court uses the modifier "alleged" for a reason. There is something about Alaska Trams' proposal that invokes the memory of Catherine the Great's Potemkin villages.

The court later explained this comment as an attempt at "judicial humor."

7. The recusal provision found in Canon 3(C)(1)(a) and the reasons requiring disqualification set forth in AS 22.20.020(a)(6) are related, but somewhat different. We have said that where a judge's refusal to disqualify himself is "patently unreasonable," we will reverse, but that in cases "[w]here only the appearance of partiality is involved" we will require a "greater showing" for reversal. *Amidon v. State*, 604 P.2d 575, 577 (Alaska 1979).

App. 6

come to the same conclusion on the basis of known facts. *Blake v. Gilbert*, 702 P.2d 631, 640 (Alaska 1985). In this regard, "[i]t should be kept in mind that a judge has as great an obligation not to disqualify himself, when there is no occasion to do so, as he has to do so in the presence of valid reasons." *Amidon* 604 P.2d at 577.

Applying these principles to the present action, we are unable to say that the refusal to disqualify Judge Pegues was an abuse of discretion. A review of the record as a whole fails to reveal any unfairness in the conduct of the trial and the alleged instances of bias, considered either collectively or individually, fail to demonstrate any specific bias or generalized pattern of bias. We, therefore, affirm Judges Pegues' and Keene's refusal to disqualify Judge Pegues for cause.

III

In its memorandum opinion, the trial court dismissed Alaska Trams' complaint with prejudice pursuant to Civil Rule 37(b) for failure to comply with discovery orders. The court stated, in part:

The court previously issued orders on April 11, 1985, and May 3, 1985, requiring Alaska Trams to make discovery as requested by [AELP]. On July 8, 1985, this court ordered Alaska Trams to make discovery by August 27, 1985, of the documents to be requested by [AELP] by July 28, 1985. The court granted this additional time in order for [AELP] to restate its discovery requests with still greater specificity to avoid any further claims of confusion by Alaska Trams. Alaska Trams was expressly warned that failure to comply with the order or to show to the court its inability to comply by August 27, 1985, would result in the complaint being dismissed with prejudice.

. . . .

App. 7

This court finds, . . . that Alaska Trams willfully and inexcusably failed to comply with this court's order after being warned of the dire consequences. While litigation-ending sanctions should be imposed sparingly, they are necessary here to deter just the kind of conduct that Alaska Trams has purposely decided to employ. Accordingly, [AELP's] motion to dismiss with prejudice is granted.

Alaska Trams argues that the dismissal sanction was improper because the court erroneously concluded that Alaska Trams willfully failed to comply with its discovery orders and because the sanction was excessive in light of the material actually withheld.⁸

Civil Rule 37(b) authorizes the trial court to impose a wide range of sanctions on a party who fails to comply with discovery orders. *Dade v. State, Child Support Enforcement Division ex rel. Lovett*, 725 P.2d 706, 708 (Alaska 1986). The purpose of the sanctions is to encourage discovery and deter noncompliance by allowing trial judges to enforce their discovery orders, and to ensure that parties will not profit from their own willful failure to comply with such orders. *Hawes Firearms v. Edwards*, 634 P.2d 377, 378 (Alaska 1981). Although sanctions which end litigation are generally disfavored and may even constitute a denial of due process, the imposition of such sanctions is justified if the failure to comply with a discovery order is willful. *Hawes Firearms*, 634 P.2d at 378. "Willful-

8. Alaska Trams also argues that the court's discovery orders were "unlawful," but it does not explain why and we are unable to perceive a basis for the allegation. Consequently, we do not consider this part of Alaska Trams' argument. E.g., *Forquer v. State, Commercial Fisheries Entry Comm'n*, 677 P.2d 1236, 1238 n.2 (Alaska 1984); *Craig Taylor Equipment v. Pettibone Corp.*, 659 P.2d 594, 596 n.1 (Alaska 1983); *State v. O'Neill Investigations*, 609 P.2d 620, 628 (Alaska 1980).

App. 8

ness'' is defined as a conscious intent to impede discovery. *Dade*, 725 P.2d at 708; *Hawes Firearms*, 634 P.2d at 378. Once noncompliance is shown, the burden is upon the non-complying party to prove that its failure to provide discovery was not willful. *Dade*, 725 P.2d at 708; *Hawes Firearms*, 634 P.2d at 378. The choice of a particular sanction is committed to the broad discretion of the trial court and will not be set aside absent an abuse of discretion. *Dade*, 725 P.2d at 708; *Hawes Firearms*, 634 P.2d at 378.

While Alaska Trams admits that it did not fully comply with the discovery order in this case, it appears to argue that the imposition of any sanction was improper because there was substantial compliance before the discovery deadline, full compliance was obtained after the deadline had passed, and its noncompliance was not willful. The trial court considered and rejected these arguments, stating:

Alaska Trams admits that some accounting and banking records requested by [AELP] were not produced until September 11 or 12. Alaska Trams argues that any prior nonproduction of materials previously in existence was inadvertent, not willful, and "was due to confusion resulting from volume and from the fact that the great majority of the records of Alaska Trams were already in the custody of the court." . . . While it is possible, although just barely, that counsel for Alaska Trams was himself personally unaware of the existence and location of the additional materials, it is totally incredible under the circumstances that his client, Chuck Keen, was unaware of them. The only reasonable conclusion, in the absence of a credible explanation—and none has been offered—is that Keen willfully withheld the materials until their discovery was compelled by the events in an unrelated case.

App. 9

We agree. Because Alaska Trams admits that it did not fully comply with the trial court's discovery orders by the stated deadline, it bore the burden of demonstrating to the court that its noncompliance was not willful. This it clearly has failed to do. Nor will the fact that Alaska Trams ultimately produced the requested materials remove the taint of its willful disregard of the trial court's production orders. *See Dade*, 725 P.2d at 707 n.1. We, thus, find no abuse of discretion in the trial court's imposition of a Civil Rule 37(b) sanction.

Alaska Trams also argues that the sanction actually imposed was excessive in light of the nature of the documents withheld and the issues to which they did or did not relate. In brief, we understand Alaska Trams to be arguing that because the materials withheld related primarily to damages issues on only certain of its tort claims, dismissal of the entire case was excessive; the sanction should have been limited to those claims actually involved.

While there certainly may be cases where outright dismissal would be an inappropriate sanction because of the trivial or incidental nature of the materials in relation to the overall action, we do not believe this to be a case of trivial noncompliance. The fact that an action includes issues other than damage issues does not mean that damages are not important; indeed, they are often of primary importance. Withholding materials relating to a party's damages may seriously prejudice the adverse party by making it difficult or impossible to adequately assess the strength of the opponent's case, thereby leaving the opponent in a weakened position for settlement negotiations or other purposes. Thus, far from being incidental, the

withheld materials in this case could be viewed as essential to the formulation of AELP's overall trial strategy. In such a case, where the noncompliance relates to substantial, as opposed to incidental, materials our inquiry must focus upon the sanctioned party's behavior. *Cf., Diapulse Corp. of America v. Curtis Publishing*, 374 F.2d 442, 446-47 (2d Cir. 1967) (dismissal of libel complaint justified where sanctioned plaintiff exhibited flagrant disregard for rules of discovery even though withheld material related only to issue of truth).

AELP's first formal request for production was served on Alaska Trams on October 12, 1984. AELP contended that the materials produced by Alaska Trams in response to this request were not complete because they included no materials relating to the ownership or financing of the tramway, no corporate or banking records, and no expenditure or tax information. Alaska Trams objected to these requests on the grounds that they were "overly broad," "burdensome," and "irrelevant." Alaska Trams also indicated that it could not be compelled to produce information pertaining to the financing of the tramway.

On December 14, 1984, AELP moved to compel production of the requested materials. This motion was granted on April 11, 1985. In granting the motion, the trial court specifically indicated that Alaska Trams was free to move for a protective order if it had justifiable concerns pertaining to the wrongful use of the financial information. However, the trial court warned Alaska Trams that it could interpose no further delay in making discovery. Alaska Trams did not move for a protective

order but it did inform AELP that it would not provide the requested financial information.

On April 25, AELP moved for sanctions for nonproduction. AELP sought an order establishing the fact that Alaska Trams had no financing for the tram project because of the project's inherent defects. Alaska Trams filed no opposition. The trial court did not, however, grant the motion, but instead, on May 3, issued a second production order to be satisfied on or before May 13.

Alaska Trams responded to this order by delivering several documents to AELP. On May 9, it filed a motion for a protective order relieving it of the obligation to produce any financial information until 90 days prior to trial. On June 18, the trial court denied Alaska Trams' "overly broad motion for [a] protective order," but it did provide Alaska Trams some limited protection and ordered Alaska Trams to comply with discovery requests on or before June 28.

Alaska Trams had still not complied with the discovery requests by July 8, and the trial court imposed limited sanctions, indicating that:

[Alaska Trams] has until the close of business on August 27, 1985, to comply fully with this order [to produce] or to prove to this court that it does not have the ability to comply. [AELP] shall by July 28, 1985, furnish [Alaska Trams] specifics on the discovery which [Alaska Trams] has failed to make, and if [Alaska Trams] fails to make that discovery by August 27, 1985, its complaint shall be dismissed with prejudice.

AELP complied with the court order in a timely manner. Despite this order, however, Alaska Trams still refused

to produce requested materials pertaining to the financial aspects and ownership interests of the tramway project. These materials had been requested more than a year previously; Alaska Trams did not file any valid objections to production or make any showing that it could not comply by the specified deadline.

On September 5, AELP moved to dismiss Alaska Trams' action for failure to comply with the trial court's July 8 production order. On September 11, Alaska Trams invited AELP's counsel to attend a production of document session the next day in an unrelated case, *Craine v. Keen*, No. 1JU-83-554 Civ., and at that time most of the materials requested for the present action were finally produced. The trial court dismissed the complaint on November 6.

Thus, in this case, the trial court issued four separate production orders regarding the same materials over the course of fourteen months, imposed non-litigation ending sanctions, and warned Alaska Trams that continued failure to produce would result in dismissal. Even after this explicit warning, however, Alaska Trams refused to produce the requested materials and provided no credible explanation for its recalcitrance. In the face of such obstinate and flagrant disregard for the court's orders and the rules of discovery, we are unable to say that the trial court's dismissal was unjustified or without reason. Accordingly, the trial court's order dismissing Alaska Trams' action with prejudice cannot be considered an abuse of discretion and is affirmed.

IV

Because of the disposition above, we need not consider Alaska Trams' other arguments.⁹ The judgment of the trial court is AFFIRMED.

9. Alaska Trams also appealed the trial court's summary judgments in favor of AELP on its contract based claims, its equitable claims, its tort claims, and its condemnation claim.

IN THE SUPERIOR COURT FOR
THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT JUNEAU

ALASKA TRAMS)
CORPORATION, a/k/a ALASKA)
TRAMS, INC.,)

Plaintiff,)

v.)

No. 1JU-84-1469
Civil

ALASKA ELECTRIC LIGHT &)
POWER COMPANY, an Alaska)
corporation; WILLIAM A.)
CORBUS; DOES I THROUGH)
XX; and an AERIAL RIGHT-OF-)
WAY AND EASEMENT 1300)
LINEAR FEET IN LENGTH,)
MORE OR LESS, PURSUANT TO)
PARAGRAPH 59 BELOW,)

Defendants.)

(P) _____)

MEMORANDUM DECISION AND ORDER

(Filed November 6, 1985)

I. *Motion for Summary Judgment.*

AEL&P has moved for summary judgment on the five remaining causes of action in this case. The causes of action are for: (1) specific performance based on AEL&P's contract breach; (2) reformation of contract based on mistake; (3) reformation of contract based on fraud; (4) reformation of deed based on mutual mistake; and (5) reformation of deed based on fraud. AEL&P contends all five of these claims are barred by the defense of laches.

Alaska Trams disputes the applicability of the doctrine of laches to this case.

A defendant must show two independent elements for the doctrine of laches to apply. First, the plaintiff must have unreasonably delayed in bringing the action. Second, this unreasonable delay must have caused the defendant prejudice or undue harm. *City and Borough of Juneau v. Betty Breck*, — P.2d — (Alaska Sup. Ct. Op. No. 2982, Sept. 20, 1985), p. 6-7. AEL&P alleges that Alaska Trams did delay unreasonably in bringing this action. This court has already determined that the delay in filing this action was unreasonable, Mem. Dec., Aug. 28 1985, p. 42, but refused to apply the defense of laches at that time, however, because AEL&P had not alleged any resulting prejudice. AEL&P now alleges that the unreasonable delay has resulted in prejudice in the form of key witnesses who have died or had their memories fade.

The most significant prejudice to AEL&P is the loss of a key witness, former AEL&P President Franz Nagel, who died in March of 1981. Mr. Nagel was intimately involved in the negotiations at issue in this case and, in fact, executed the warranty deed delivered to Mr. Keen in 1976. Mr. Keen has stated that he dealt equally with Bill Corbus and Franz Nagel in the negotiation process and that "this dispute would be resolved immediately" if Mr. Nagel were still alive. Declaration of Chuck D. Keen in Opposition to Motion for Summary Judgment dated February 14, 1985. Mr. Nagel died well over four years after the land sale contract was entered into. If suit had been brought in a reasonable period of time, Mr. Nagel would still have been alive and available as a witness. Another potential wit-

ness, Ruedi Kuenzler, a former business associate of Mr. Keen's, also died before this action was brought. Loss of a witness through death can be sufficient to demonstrate prejudice. *Hanns v. Hanns*, 423 P.2d 499, 513 (Ore. 1967). The party claiming it has been prejudiced does not have to show that the unavailable witness's testimony would have been favorable to his or her position. *Gerhard v. Stephens*, 442 P.2d 692, 723 n. 44 (Cal. 1968); cf., *Boone v. Mechanical Specialties Co.*, 609 F.2d 956 (9th Cir. 1979) (severe prejudice demonstrated by a showing that possible witnesses were unavailable).

Additionally, at least one important witness has stated that his recollection has faded considerably in the more than eight years since he was involved in the negotiations at issue. Affidavit of Warren Wild, Aug. 16, 1985. Sufficient prejudice to justify the application of laches can result from a witness's having "suffered impairment of memory or mental faculties." *Jernigan v. Scott*, 518 S.W. 2d 278, 283 (Tex. Civ. App. 1974).

This court finds that AEL&P has been prejudiced by Alaska Trams' unreasonable delay in bringing this action. Alaska Trams' arguments against applying laches here lack merit.

AEL&P's motion for summary judgment against Alaska Trams on the remaining five claims for equitable relief is, therefore, granted.

II. *Motion to Dismiss.*

AEL&P has also moved this court for an order dismissing this action with prejudice pursuant to the court's

order of July 8, 1985.¹ The court previously issued orders on April 11, 1985, and May 3, 1985, requiring Alaska Trams to make discovery as requested by AEL&P. On July 8, 1985, this court ordered Alaska Trams to make discovery by August 27, 1985, of the documents to be requested by AEL&P by July 28, 1985. The court granted this additional time in order for AEL&P to restate its discovery requests with still greater specificity to avoid any further claims of confusion by Alaska Trams. Alaska Trams was expressly warned that failure to comply with the order or to show to the court its inability to comply by August 27, 1985, would result in the complaint's being dismissed with prejudice. AEL&P contends that Alaska Trams failed to comply with the court's order and the complaint should, therefore, be dismissed with prejudice.

AEL&P has adequately demonstrated that not all of the specified materials were produced and that no showing of inability was made by the prescribed date. AEL&P contends that some of the specified material requested, which it believes to be in existence, has still yet to be disclosed, *e.g.*, loan applications. It is undisputed that a large amount of the material that had been requested by AEL&P was not made available until September 11 or 12, 1985, and then only as an indirect result of an order issued in another proceeding. On September 4, 1985, counsel for Alaska Trams, Mr. Petersen, and counsel for AEL&P, Mr. Clough, were both present in court at an evidentiary hear-

¹ Although it is arguable that this motion was rendered moot by the granting of summary judgment, this court will still consider and rule on the motion to dismiss so that, in the event of an appeal, the appellate court will have before it this court's rulings on both motions.

ing in another civil case in which an out-of-state creditor was trying to enforce a judgment against Mr. Keen, *Craine v. Keen*, Case No. 1JU-83-554. Keen had been directed to make production of financial information about Alaska Trams at or before the evidentiary hearing. When Keen failed to produce the financial information, Judge Carpeneti continued the evidentiary hearing until September 12, 1985, and directed Keen to make the financial documents available at or before that time. Mr. Petersen subsequently informed Mr. Clough of when and where Keen would be making his financial records available to the plaintiff in the *Craine* case and invited Mr. Clough to attend. Mr. Clough attended the production session and, for the first time, was given access to thousands of documents on the financial operations of Alaska Trams. These documents had previously been requested by AEL&P but had never been produced.

Imposing sanctions which end litigation without reaching the merits is generally disfavored and such sanctions should not be imposed merely to punish a failure to comply with a court order. *See Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 350, 53 L.Ed. 530, 544-45 (1909). Litigation ending sanctions are appropriate in some circumstances, however. In *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643, 49 L. Ed. 2d 747, 751 (1976), the United States Supreme Court recognized the appropriateness of using litigation ending sanctions "to deter those who might be tempted to such conduct in the absence of such a deterrent."

For a litigation ending sanction to be imposed under Civil Rule 37(b)(2), Alaska Trams must willfully have

failed to make the ordered production. *Hawes Firearms Co. v. Edwards*, 634 P.2d 377, 378 (Alaska 1981). Willfully means “not mere delay, inability or good faith resistance.” *Id.* Once the court finds that the material available to Alaska Trams was not produced as required by the court’s order, Alaska Trams has the burden of proving such non-production was not willful. *Pew v. Foster*, 660 P.2d 447, 449 n. 3 (Alaska 1983). *Hawes Firearms Co. v. Edwards*, 634 P.2d at 378 n. 2. Alaska Trams admits that some accounting and banking records requested by AEL&P were not produced until September 11 or 12. Alaska Trams argues that any prior nonproduction of materials previously in existence was inadvertent, not willful, and “was due to confusion resulting from volume and from the fact that the great majority of the records of Alaska Trams were already in the custody of the court.” Attorney for Alaska Trams’ Certificate of Counsel, September 22, 1985. While it is possible, although just barely, that counsel for Alaska Trams was himself personally unaware of the existence and location of the additional materials, it is totally incredible under the circumstances that his client, Chuck Keen, was unaware of them. The only reasonable conclusion, in the absence of a credible explanation—and none has been offered—is that Keen willfully withheld the materials until their discovery was compelled by the events in an unrelated case.

The fact that discovery was ultimately made does not preclude dismissing Alaska Trams’ complaint. In *Hawes Firearms Co.*, the Alaska Supreme Court reviewed the trial court’s use of sanctions under Civil Rule 37(b). The defendant had failed to comply with the trial court’s order to answer interrogatories and make discovery. The trial

court sanctioned the defendant by striking its defenses which effectively decided the defendant's liability and precluded consideration of any meritorious defense. The defendant answered the interrogatories and made discovery after sanctions were ordered. On appeal, the Alaska Supreme Court upheld the sanctions ordered by the trial court and quoted the following with approval:

Final production is not determinative. The rule permits a sanction when a party "fails to obey an order." . . . The ultimate, and reluctant, production of documents, more than a year after a legitimate request does not absolve [a party] of the charge that it willfully failed to obey a valid court order.

634 P.2d at 380, *quoting*, *State of Ohio v. Arthur Andersen & Co.*, 570 F. 2d 1370, 1374 (10th Cir. 1977). *cert. denied*, 439 U.S. 833, 58 L. Ed. 2d 129 (1978).

The instant case is analogous to the factual situation in *Hawes Firearms Co.* Alaska Trams willfully failed to obey repeated orders for discovery just as the defendant in *Hawes Firearms Co.* did. The fact that discovery was not made in *Hawes Firearms Co.* until after sanctions were imposed does not distinguish the two cases. Alaska Trams willfully disobeyed orders of this court and ultimate discovery was made only after the final deadlines set in this case and then as a result of events in an unrelated case and not to comply with the order in this case.

The documents which AEL&P finally received at the production session for the *Craine* case involve the financial status and operations of Alaska Trams. These documents are essential to Alaska Trams' claims that it expended large amounts of money on the tramway project in reliance

on AEL&P's promises and, thus, incurred damages. These documents are also essential to AEL&P's claim that Alaska Trams never possessed financing for the tramway project because the project is not economically feasible. Given the nature of the documents that Alaska Trams has been willfully refusing to disclose, it is reasonable for this court to infer that Alaska Trams has no case—or at best a very weak case—on the merits. In *Hammond Packing Co. v. Arkansas*, the supreme court approved a presumption by the trial court that a party's failure to produce documents essential to the case "was but an admission of the want of merit in the asserted defense." 212 U.S. at 351, 53 L. Ed. at 545.

In light of Alaska Trams' repeated willful noncompliance with this court's orders, including willful noncompliance after being expressly warned that continued noncompliance would result in the dismissal with prejudice of the complaint, this court concludes that Alaska Trams' ultimately making discovery after the deadline is irrelevant in determining the appropriateness of sanctions. As already stated, discovery was finally made not in an effort to comply with this court's order but rather as a result of a court proceeding in an unrelated case.

Additionally, AEL&P asserts that Alaska Trams has also failed to make a complete and full written response to the request for production as required by Civil Rule 34(b) and by the court's July 8, 1985, order. In response, Alaska Trams states that it fully complied by making written responses to AEL&P on three occasions, the most recent being August 27, 1985. The only evidence Alaska Trams has offered in support of its position is a statement by its counsel, A. Lee Petersen's Certificate of Coun-

sel, dated September 22, 1985, and a copy of a response dated November 14, 1984. AEL&P contends that the responses which Alaska Trams did make were insufficient and did not comply with Rule 34(b). This court concludes that Alaska Trams' response does not adequately support its assertion that it has fully complied with this provision of the July 8, 1985, court order.

This court finds, therefore, that Alaska Trams willfully and inexcusably failed to comply with this court's order after being warned of the dire consequences. While litigation-ending sanctions should be imposed sparingly, they are necessary here to deter just the kind of conduct that Alaska Trams has purposely decided to employ. Accordingly, AEL&P's motion to dismiss with prejudice is granted.

III. *Motion for Additional Attorney's Fees.*

AEL&P asks for an award of their attorney's fees for work incurred as a result of Alaska Trams' noncompliance with the court's discovery orders. Alaska Trams does not dispute the amount of AEL&P's request but rather disputes AEL&P's entitlement to any award of attorney's fees.

Alaska Trams makes two arguments why attorney's fees should not be assessed against it. First, Alaska Trams argues that it should not have to pay for work AEL&P's counsel would have to do in any event since, whether further discovery motions were sought or not, AEL&P's counsel would still have to review every document disclosed in preparing its case. Further, if AEL&P only requested the production of the materials so it could make

further motions for discovery, then the discovery requests could not have been in good faith. This argument would be valid only if AEL&P had sought discovery in bad faith merely to frustrate Alaska Trams' case. This is not the situation, however. AEL&P has repeatedly made showings to this court that full discovery is necessary and essential to the preparation of its case.

Second, Alaska Trams argues that sanctions are unjustified and relies on *Ketchikan Cold Storage Co. v. State*, 491 P.2d 143, 148 (Alaska 1971), for the proposition that a party refusing to make discovery can only be required to pay the other party's attorney's fees when the refusal is "without substantial justification." In that opinion, the court stated that the sanction of paying the opposing party's attorney's fees for obtaining the discovery order is appropriate when the refusing party had disregarded the court's discovery order, acted unreasonably, recalcitrantly or captiously, but it is inappropriate to punish an innocent party whose refusal to make discovery is reasonable. *Id.*, at 148-49. Alaska Trams asserts that it "has not been recalcitrant. It has gone far beyond the requirements of the rules in its compliance." Alaska Trams' Memorandum in Opposition to Motion for Additional Attorney's Fees. The evidence is to the contrary.

Alaska Trams appears to argue that the requirement in *Ketchikan Cold Storage Co.* that noncompliance be "without substantial justification" applies to all the attorney's fees sought in this motion. This is not correct. A noncomplying party must have acted "without substantial justification" only to properly be ordered to pay the opposing party's costs *in obtaining the discovery order*.

Id., at 148. Once discovery has been ordered, failure to comply subjects the noncomplying party to the sanction of paying the other party's costs in attempting to enforce the discovery order. *Id.*, at 149. As the court stated in *Ketchikan Cold Storage Co.*, "costly tardiness and lack of cooperation with the discovery process does justify the imposition of sanctions under Rule 37(b)." *Id.* It is not required that the noncomplying party act in bad faith or without substantial justification. The mere fact that the party unexcusably failed to comply with the court's discovery order is sufficient to justify awarding the other party's attorney's fees.

Accordingly, AEL&P's motion for additional attorney's fees in the amount of \$2,440.50 for work incurred as a result of Alaska Trams' noncompliance with the court's discovery order is granted.

CONCLUSION.

Summary judgment is granted in AEL&P's favor on all the remaining claims in this case. Additionally, this action is dismissed with prejudice for Alaska Trams' noncompliance with this court's order dated July 8, 1985. AEL&P's motion for additional attorney's fees is granted. Alaska Trams is ordered to pay to AEL&P \$2,440.50 for attorney's fees.

IT IS SO ORDERED.

DATED this 6th day of November, 1985.

/s/ Rodger W. Pegues
Superior Court Judge

App. 25

CERTIFICATION

This is to certify that on the 6th day of November, 1985, I provided a true and correct copy of the above to:

A. Lee Petersen, Esq.
Ronald A. Clark, Esq.
Melvin M. Belli, Esq.
John F. Clough, Esq.

/s/ Sue E. Bailey
Secretary to the Judge
